

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re:)	
)	
Transaction Network Services, Inc., TSYS)	CC Docket No. 95-155
Acquiring Solutions, LLC and Electronic)	
Payment Systems, LLC)	
)	
Regarding FCC Jurisdiction and RespOrg)	
Responsibilities to Comply with Part 52 of)	
the FCC's Rules and the MS/800 Tariff)	
Requirements)	
To: Office of the Secretary		
Attn: Chief, Wireline Competition Bureau		

ELECTRONIC PAYMENT SYSTEMS, LLC'S
REPLY REGARDING ITS APPLICATION FOR REVIEW

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INTRODUCTION

The Bureau's ruling is a complete ban on subscriber transfers without advance FCC approval, which may be granted only in matters of life or death. Those who violate this absolute ban risk termination of their status as a RespOrg or subscriber.¹ The standard industry practice is to transfer numbers or change the subscriber of record routinely in situations where none of the Commission's rules or policies are violated. At TSYS' behest, the Bureau's declaratory ruling takes an extreme literal view of number transfers, thus invalidating this industry practice. If allowed to stand, this interpretation will impose a huge burden on the FCC and on commerce in general, as every business

¹Declaratory Ruling of the Wireline Competition Bureau, Docket No. 95-155, *In the matter of Transaction Network Services, Inc., TSYS Acquiring Solutions, LLC, and Electronic Payment Systems, LLC, Regarding FCC Jurisdiction and RespOrg Responsibilities to Comply with Part 52 of the FCC's Rules and the SMS/800 Tariff Requirements*, dated February 24, 2011.

acquisition, internal corporate reorganization, purchase of assets in bankruptcy, and numerous other commercial transactions will have to include an FCC approval of the transfer of the affected toll-free numbers.

Ironically, even the numbers at issue in this proceeding would be affected. In 2002 TNS, as RespOrg, contracted with VITAL, as subscriber, to provide the three toll free numbers that are the subject of this proceeding.² Between 2002 and the present, TSYS became VITAL's successor, through a voluntary commercial transaction.³ At the time of that transaction, VITAL ceased to exist and therefore VITAL's use of the three numbers ceased. But the numbers were not returned to the spare pool as the Bureau's ruling requires. The numbers were transferred from one subscriber to another. Neither the subscriber involved, TSYS, nor the RespOrg involved, TNS, obtained FCC approval of the transfer. In an act of unmitigated hypocrisy, both TSYS and TNS argue that they cannot do now what they did before - transfer these same three numbers to a new subscriber - EPS. To avoid creating a major disruption in commerce in this country, the Ruling should be revised to recognize the long standing industry practice, supported by FCC rules, common sense, and case law, which allows voluntary commercial transactions involving subscriber transfers that do not violate FCC rules regarding hoarding or brokering, without FCC approval.

BACKGROUND FACTS

Before addressing the deficiencies of TSYS' legal assertions, TSYS' factual misrepresentations must be corrected. It is time to put to rest TSYS' incessant misrepresentations

²See excerpt of Transaction Processing Network Master Services Agreement Between VITAL Processing Services, LLC and Transaction Network Services, Inc., dated October 29, 2002, attached as Exhibit A.

³See TSYS Opposition to Application for Review, p. 2, in which TSYS indicates it is the "subscriber of record" of the numbers.

about how the toll free numbers came to be placed in the terminals of EPS merchants. In 2005 TSYS converted virtually all of EPS' merchants from CardSystems to TSYS. In doing so, TSYS set up certain "host files" with a primary number and a back up number, which were supposed to be unique to EPS, and downloaded them into EPS' merchants terminals. When new merchants were later added, EPS did not select numbers. EPS simply used the same host files set up by TSYS with the same numbers provided by TSYS. The installation of any numbers was done solely by or at the direction of TSYS, not EPS.⁴ TSYS concealed the fact that the numbers it put into EPS' merchants terminals were not unique to EPS, until long after the arbitration was over.⁵ TSYS' efforts to change these facts, as determined by the arbitrator and the courts, and as confirmed by the attached declaration by Mr. Marshall, are simply TSYS' delusional fiction.

The arbitrator found TSYS breached its contract by failing to provide EPS the number that connects its merchants to a processor. To implement the arbitrator's intent, the Court has ordered that TSYS make the EPS numbers unique to EPS by moving all non-EPS merchants to other numbers.⁶ Whatever conclusion is reached here about the transfer of the numbers to EPS, the FCC should make clear that its ruling is not intended to block that portion of the court's order which instructs TSYS to separate the EPS and other merchants by leaving EPS on the current numbers and moving non-EPS merchants to new ones.

TSYS has advanced several assertions which it purports support denial of EPS' application. Addressing them in the order presented, EPS replies as follows:

⁴See Declaration of Timm Marshall, attached as Exhibit B.

⁵*TSYS v. EPS*, Case No. 2:09 cv 0155, United States District Court for the District of Arizona, Doc. No. 15, page 4, November 5, 2009.

⁶See Exhibit C: Order in *TSYS v. EPS*, as modified by Exhibit D: Order, which has been stayed until EPS' application to the FCC for review has been resolved.

1. Transfer of the number to EPS serves multiple legitimate purposes.

In this section, TSYS re-argues its assertion that even if EPS is made the subscriber, the merchants cannot be moved to another processor because of certain codes TSYS inserted into EPS' merchants' terminals that will have to be changed before EPS can use a new processor. This issue has been raised before the Court multiple times and rejected each time.⁷ The Commission should resist TSYS' insistence that the Commission enter where federal courts refuse to go, lest the Commission become viewed as an appeals court for losing parties in binding arbitrations. Whether the Commission is "legally bound" by the arbitration and court proceedings, it should follow a policy of avoidance of intervention in such proceedings, especially where it is asked to rehear factual findings reached after formal evidentiary proceedings, such as binding arbitration.

One legitimate purpose to be served by the transfer from TSYS to EPS, is the same as the legitimate purpose served by the previous transfer of these same numbers from VITAL to TSYS - the uninterrupted continuation of business as part of a voluntary commercial transaction. The transfer of the numbers to EPS serves several other legitimate and strongly favored purposes, including but not limited to: the express Congressional policy favoring arbitration and enforcement of arbitration awards,⁸ enforcement of contracts,⁹ enforcement of judgments,¹⁰ and *res judicata*.¹¹

2. EPS' application presents several sound legal bases for challenging the Declaratory Ruling.

TSYS' assertion that EPS has not presented any legal basis to challenge the Ruling is

⁷See Exhibit E: Order of Judge Campbell and Exhibit F: Order of Judge Teilborg

⁸*Hall Street Assocs., LLC v. Mattel, Inc.*, 522 U.S. 576, 128 S. Ct. 1396 (2008).

⁹*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346 (1985).

¹⁰*Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S. Ct. 2424, 2429, citing *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876).

¹¹*Id.*

completely specious. Quite simply, EPS demonstrated the Ruling may be substantially accurate in its literal reading of FCC rules, but the Ruling's extreme interpretation and application of those rules overstates what some of the rules say, and is contrary to longstanding industry practice and common sense. If the extreme literalism of the Ruling is allowed to stand, the FCC will find itself facing a huge new administrative burden and become the target of severe criticism for placing a new, wholly unnecessary, regulatory burden on commerce.

The Ruling overstates what the commissions' rules say with regard to exceptions to the first-come, first served rules. The first-come, first served rule, Section 52.111, recognizes the authority of the Commission to "direct otherwise." Nothing in this Sections states or implies waivers and exceptions apply only when human life is at stake. The Ruling creates a limitation that is not in the Rules.

The Ruling is contrary to long standing industry practice and common sense. TNS transferred VITAL's subscriber interest to TSYS without FCC approval not in an effort to avoid FCC regulations. They did so because they knew then, as they know now, that the industry practice is to transfer subscriber interests in commercial transactions without FCC approval where the change (1) does not violate an express prohibition in FCC rules or policies, such as hoarding or brokering, and (2) the transfer is necessary to facilitate the uninterrupted continuation of business as usual.

Examples of such transfers which should not require FCC approval include transfer of a number to a remaining family member, transfer of a number resulting from a business name change, merger, acquisition, internal organization, transfer of a number from an existing service provide to a new service provider servicing the same customers, or transfer of assets out of bankruptcy. Such transfers happen every day, and are performed upon request by every RespOrg. To know that these business transactions occur many times every day one need only read the business news. To know

the FCC is never asked for approval for these changes, one need simply search the FCC records seeking requests for approval of such transfers - there are none. Neither TSYS nor TNS even attempts to dispute such occurrences. TNS' silence is particularly telling, since it is a RespOrg. These facts clearly demonstrate such "transfers", though contrary to the Ruling, are industry practice and the accepted industry interpretation of FCC rules.

The FCC's stated rules and policies adopt "first-come, first-served" assignment and prohibit brokering, hoarding and similar treatment of numbers. These policies are in no way implicated by the types of transfers undertaken in acquisitions, bankruptcies, internal business reorganization, transfers to new third party service providers servicing the same customers,, nor transfers like the previous transfer of these three numbers to TSYS, or the present transfer of the same three numbers for the same purposes to EPS. Where the change in the subscriber is merely a by-product of a legitimate business transaction and there is no brokering or hoarding, industry practice has selected a reasonable, common interest interpretation. The FCC should avoid upsetting a process that is not broken, by rejecting the unduly restrictive interpretation adopted by the Bureau and grant the Application for Review recognizing industry practice.

TSYS criticizes EPS reliance on the 855 guidelines promulgated by Atis and the case of *Ford Motor Co. V. United States Auto Club*, 2008 U.S. Dist. LEXIS 74198 (Tex. Dist. 2008). TSYS provides absolutely no authority, other than its own unsupported assertions, to suggest the guidelines or the *Ford* case are incorrect or inapplicable. By analogy, the industry numbering guidelines for 855 numbers expressly recognize this sort of change, requiring only after-the-fact notice of changes in subscriber of record names. That such guidelines are not "official" or are not directly applicable

to 800 numbers misses the point.¹² The express acknowledgment of permissible changes in the name of a subscriber of records shows that such actions are standard industry practice and the accepted industry interpretation of FCC rules.

Apparently conceding the *Ford* case is on all fours with the present facts (move numbers to new third party service provider), TSYS argues *Ford* is simply wrong. *Ford* has never been appealed or even distinguished. No FCC ruling has ever suggested *Ford* is invalid and should not be followed. In addition, *Ford* points out that in many instances the Court is able to determine that no hoarding or brokering is involved, and therefore there is no need for FCC involvement. The same is true here.

3. EPS has not perpetrated any fraud on the FCC

TSYS' argument that EPS has misled the Commission reflects TSYS' counsel's unfamiliarity with the arbitration award and the Court's subsequent rulings. The arbitrator conclusively determined that in 2005, TSYS voluntarily contracted with EPS to provide EPS with the toll free connection between its merchants and the processor to enable EPS to move its merchants to another processor without incurring loss of merchants through another conversion.¹³ TSYS failed to disclose that the connection consisted of seven numbers and, more importantly, that the numbers it had installed into EPS' merchants terminals were not unique to EPS. To implement the arbitrator's award, the Court has ordered that the numbers be made unique to EPS by first requiring TSYS to move the non-EPS merchants to different numbers, and then to transfer TSYS' interest in the

¹² Contrary to TSYS' allegations that such rules are of no weight, 800-855 Number Assignment Guidelines are developed by the Industry Numbering Committee ("INC"). 47 C.F.R. § 52.13 specifically charges the North American Numbering Plan Administrator with complying with the guidelines of the INC.

¹³ See Exhibit G: Arbitrator's Findings, Conclusions, and Final Award, dated January 20, 2009 AAA Case No. 76-103-0000038-VIAM, pp. 4-5, 32, and 39.

numbers to EPS.¹⁴ Once the Court's order is enforced, any potential harm to non-EPS merchants will be eliminated if EPS moves its numbers to a new processor, as the non-EPS merchants will be on different numbers. Therefore, the agreement, as determined by the arbitrator and enforced by the Court has everything to do with allowing EPS' business to continue without interruption when it shifts to a new processor, as the same merchants will be processing using the same numbers.

It should be emphasized that the critical dispute here from TSYS' perspective (unlike EPS' perspective) is not over control of the numbers. Instead, it is over the requirement that TSYS separate the EPS traffic from the other TSYS customer's traffic. Since TSYS wrongfully intermingled that traffic, the separation process requires that someone be moved to new numbers. The Court determined that what the arbitrator intended was for TSYS to bear the burden of its misconduct. To implement the arbitrator's intent, the Court has ordered that EPS not be moved, and ordered TSYS to move the other merchants to new numbers. The subsequent transfer of the numbers to EPS after this move is accomplished is merely further insurance against TSYS again commingling EPS and other traffic in the future. It is a desire to change the Court's remedy that lies at the heart of TSYS' unsuccessful attempts to obtain court intervention and its attempt to involve the FCC by rearguing the facts associated with the movement of EPS traffic as compared to moving non-EPS traffic. While TSYS argues about transferring the numbers, it is using the FCC processes to refuse to move the non-EPS merchants to different numbers, which is not properly an issue of FCC concern because it has nothing to do with number assignment. Therefore, regardless of the FCC's decision regarding the transfer of the numbers from TSYS to EPS, the Commission should make it clear that its ruling is not intended to interfere with the remedy awarded by the Court to

¹⁴Case No. 2:09-cv-0155, *TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC*, See Order dated January 28, 2011 (Doc. No. 102), as modified by Order dated February 15, 2011, Doc No. 108)

separate the EPS traffic from non-EPS traffic.

Nor does TSYS' improper disclosure of the confidential settlement letter indicate the Commission has been misled. Taken in context of what TSYS is truly seeking the confidential settlement letter was in no way an attempt to "sell" or broker toll-free numbers. It was merely a (confidential) attempt to value the damages incurred by EPS were it required to change its merchants numbers. Even a cursory review of the settlement letter clearly reveals that what EPS' counsel said was (1) the value of the number to EPS is huge, particularly in light of EPS' experience with the CardSystems security breach, (2) Portability of its merchant portfolio is a critical issue for EPS, and (3) the proposed settlement is not just for the numbers, but also for contract claims of \$17.8 million and possibly \$100s of millions damages for the constructive trust placed on TSYS use of the numbers. No FCC policy is implicated by TSYS' need to pay money damages to EPS to cover losses incurred by EPS as a result of TSYS' breach of its contractual obligation to place EPS merchants on their own unique number from 2005 forward.

Let the record be clear. EPS wants the numbers awarded to it by the arbitrator and confirmed by the courts. EPS does not want money in lieu of what it was awarded. To the extent any offer was extended by EPS in response to TSYS request for a "global" settlement, such offer has been and is once again completely and unequivocally withdrawn.

It is TSYS, not EPS, that has misled the FCC. TSYS' misconduct before the FCC is consistent with its history of deception. The arbitrator found TSYS committed multiple deceptive trade acts against EPS.¹⁵ TSYS submitted false declarations to the Court, stating there was only one RespOrg providing only three toll free numbers, when in fact there were two RespOrgs providing at least seven numbers. Perhaps most telling is TSYS' deception of EPS, non-EPS merchants, and

¹⁵ See Arbitrator's award referenced in footnote 13, pp. 33-35.

the arbitrator, in never disclosing that despite TSYS' agreement to provide EPS its own unique number, it put EPS merchants on the same numbers as hundreds of thousands of non-EPS merchants. As determined by the Court, it is TSYS' misconduct that put the non-EPS merchants at risk.¹⁶

4. EPS is not hoarding or brokering

TSYS' assertion that EPS is hoarding numbers is as desperate as it is pathetic. Hoarding is defined by 47 C.F.R. §52.107, which consists of obtaining numbers and not using them. As demonstrated previously, EPS has never sought numbers it does not intend to use. In fact, EPS is seeking numbers it is already using. The suggestion that somehow this involves "hoarding" is truly bizarre. Brokering is also defined by 47 C.F.R. §52.107 and involves selling a number to another person or entity for a fee. The only support TSYS offers for its assertion EPS is brokering the numbers is one sentence in the confidential settlement letter discussed above. When put in context, the letter does not represent an effort to broker the numbers and EPS has made clear it does not intend or desire to sell the numbers - it simply wants the control of the numbers it has been awarded.

5. EPS' application is supported by the public interest

Much of the public interest at stake has been discussed above, including the public's and Congress' interest in promoting and enforcing arbitration, enforcing contracts, enforcing judgments and *res judicata*. To the extent there is any further public interest in this private breach of contract claim, it favors EPS overwhelmingly. The public interest will be served by clarifying and limiting the Ruling's extreme literal interpretation which, if allowed to stand and the current industry practice is overruled, will have multiple negative consequences for the economy and the Commission, as discussed above. In addition, the Commission's longstanding public interest policies favoring "number portability" will be furthered by granting the Application. Ironically, if EPS had been the

¹⁶See Exhibit C: Judge Teilborg's 1/28/11 Order.

original subscriber of record for these three numbers, as it should have been, this dispute would be wholly different. As the subscriber, EPS would have the ability under FCC portability policies to move its services from one provider and/or Resporq to another without the involvement or intervention of TSYS. But because TSYS breached its agreement and failed to provide EPS its own unique numbers, with EPS as the subscriber of those numbers,, EPS has been forced to sue for breach of contract, win a binding arbitration, fight through multiple court actions, and now, two years later, an FCC proceeding, all without getting the remedy it was awarded - the right to its own, exclusive toll-free numbers. The Ruling puts the Commission in opposition to its own public interest findings in its lengthy portability proceedings.


6. The relief EPS seeks is available

Finally, TSYS argues the record compiled in this proceeding is insufficient to grant a waiver to move the numbers to EPS, if such approval is required. This too is absurd. The facts describing the situation here are complete and TSYS has had an adequate opportunity to state its case opposing a waiver. To the extent such a waiver is deemed necessary, the Commission has every legal basis for granting it here without further proceedings.

CONCLUSION

WHEREFORE, EPS respectfully requests that the Commission revise the Bureau's ruling to allow transfers of numbers without FCC approval in the limited circumstances set forth above.

RESPECTFULLY SUBMITTED this 25th day of April, 2011.



Scotty P. Krob
Attorney for Electronic Payment Systems, LLC

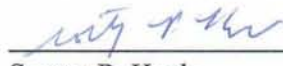
CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2011, I electronically transmitted the foregoing document to the Federal Communications Commission using the ECFS System for filing. A copy of the foregoing Application for Review to the following via first-class mail, postage prepaid:

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